IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU **CCT/0258/2022**

In the matter between

THABANG RAMASHAMOLE **APPLICANT**

And

MPHO MATHIBA **1ST RESPONDENT**

DEPUTY SHERIFF **2ND RESPONDENT**

Neutral Citation: Thabang Ramashamole v Mpho Mathiba & 1 [2023] LSHC 90 Comm. (04 May 2023)

CORAM: **M. S. KOPO, J**

HEARD: **10/01/23**

DELIVERED: **04/05/23**

SUMMARY

Civil Procedure – Urgency- matter considered urgent-Grounds of Rescission re stated. Application for rescission dismissed with costs.

Annotation

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Cases

Lesotho

Lehana Mandoro v Libe Mohono CIV/A/26/14

Thamae and Another v Kotelo and Another (C of A (CIV) NO16/2005) (NULL) [2006] LSHC 40 (01 January 2006)

Mosaase v R C of A (CRI) NO 12/05

South Africa

Grant v Plumbers (Pty) Ltd 1949 (2) SA 470

Melane v Santam Insurance Ltd 1962 (4) SA 531

Statutes

High Court Rules No. 9 of 1980

JUDGMENT

[A] INTRODUCTION

[1] On the 16th day of June 2022, the Plaintiff in the main issued summons against the Defendant wherein he claimed payment of M40, 000.00 (Fourty thousand Maloti) and Costs of suit based on breach of contract.

[2] It was the Plaintiff's case that on the 15th day of June, 2021 at Ha Tsolo in the district of Maseru, he entered into an oral agreement with the Defendant. The terms of the said agreement were that the defendant would sell his residential site situated at Ha Thetsane in the district of Maseru to the Plaintiff. In turn, the Plaintiff would pay the Defendant the amount of **M40, 000.00** for the said site. Upon the said payment, the Defendant was to process a lease of the site and get it registered in the names of the Plaintiff.

[3] The Plaintiff's case is further that, in compliance with the terms of the contract, he indeed paid the Defendant the said **M40,000.00** but in breach of the contract, the defendant failed to effect the transfer of the site as

agreed. For that reason, the Plaintiff elected to cancel the contract and demand payment of the moneys paid.

[4] The Defendant having failed to enter any Appearance to Defend the matter, the Plaintiff applied for Default Judgment which I duly granted on the 30th day of August 2022. The present Application, therefore, seeks to rescind the said judgment granted in default.

[B] APPLICANT'S CASE

[5] It is the Applicant's (Defendant in the main matter) case that he indeed received the summons but since he is an illiterate Mosotho man, he is only conversant with the procedure of the Local Courts. The Applicant goes on to show that his expectation was to receive a date of hearing later as is the practice in the Local Courts. He was only surprised when he got a court order showing that a judgment had been granted against him.

[6] In an attempt to show that he has a *bona fide* defence, the Applicant's case is that the agreement was that he would assist the 1st Respondent (Plaintiff in the main matter) to get the lease. He goes on to show that he could not have agreed to transfer the lease as the site did not have a lease.

[C] 1ST RESPONDENT'S CASE

[7] The 1st Respondent opposes the application and shows that the Applicant was in wilful default as lack of knowledge on his part should not be a ground for non-compliance with the court process. The 1st Respondent showed further that he found out that the Applicant does not have the relevant papers for the site only when they went to the Maseru City Council, and it showed them that the site belongs to it not the Applicant. For this reason, therefore, the 1st Respondent argues that the Applicant does not have a *bona fide* defence.

[D] ANALYSIS OF THE MATTER

[8] The Applicant moved urgently in this matter and the Respondent opposed the urgency. I however found no reason why this matter could not be treated as urgent and as a result granted the interim order initially.

[9] The law on rescission is settled in this country. Applicant can apply for rescission of a judgment granted in default by invoking either **Rule 27** or **Rule 45 of the High Court Rules**[1] or even under the common law. Rule 45 is concerned with rescission of a judgment erroneously granted. In the

[1] Legal Notice No. 9 of 1980

present matter, Applicant is not moving under Rule 45 or at least is not alleging in any of his papers that the judgment was erroneously granted. Indeed, Advocate Fihlo in her Heads of Argument exerted her effort on showing that the Applicant was not in wilful default and that he has a *bond fide* defence. The grounds of rescission under the common law will therefore be looked at.

[10] I have previously quoted with approval, the South African case of **Grant v Plumbers (Pty) Ltd**[2] (Majara J also relied on this matter in **Lehana Mandoro v Libe Mohono**[3]) wherein Brink J mentioned that an applicant who shows good cause must show the following:

> *a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the court should not come to his assistance.*
>
> *b) His application must be bona fide and not made with the intention of merely delaying plaintiff's claim*
>
> *c) He must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.*

[2] 1949 (2) SA 470
[3] CIV/A/26/14

In an attempt to explain his default, the Applicant shows that he is an illiterate person who is only conversant with the procedure of the Local Courts. He admits being served with the summons but, as is procedural in the Local Courts, he expected that he would later be informed as to when the matter would proceed. However, the Summons clearly informs the defendant therein that if he/she does not respond within the time stipulated therein, judgment will be given against him. The return of service filed of record clearly shows that the nature of the summons were explained to him. It is not believable that the Applicant could not have understood the issue of a date as explained to him. He was informed that judgment would be given against him if no intention to oppose the matter was not entered. There was therefore an element of negligence or apathy on the part of the Applicant and therefore he was in wilful default. In any case, the process of the court would be a mockery if ignorance of the law or court procedure would be taken as an excuse. The reason why the sheriff of the court explains the nature of the process is to make sure that one who is served is aware of the next step he would take. Having concluded thus, I turn now to consider if the Applicant has a bona fide defence.

[11] While I am at this stage considering if the Applicant has a bona fide defence, I am mindful of the judgment of the Court of Appeal in **Thamae and Another v Kotelo and Another**[4] wherein the court stressed the importance of not looking at grounds mentioned in paragraph 10 above in their totality as opposed to isolating them. The court therein cited the case of **Mosaase v R**[5] wherein the following passage from the South African case of **Melane V Santam Insurance Ltd**[6] was quoted.

> *"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts…*

[4] (C of A (CIV) NO16/2005) (NULL) [2006] LSHC 40 (01 January 2006)
[5] C of A (CRI) NO 12/05
[6] 1962 (4) SA 531 at 532 C-F

[12] In an attempt to show that he has a *bona fide* defence, the Applicant avers that he sold the Applicant a site without a lease but agreed that he would assist him in getting one. He however denies that he told the Applicant that the site had a lease and therefore it could not be true that he promised to transfer the title of the site to him (the Respondent). Applicant is adopting a rather technical approach in his answer. The Respondent has shown that he attempted on several times to get the Applicant to give him the title to land, whether it would be through him getting the site registered in the names of the Respondent, it means that the site was not in the names of the Respondent. It is, therefore, clear that what the Respondent needed was to have the site registered in his names. What became apparent during the present application is that the site most probably had never been registered in the names of the Applicant. The prospects of success are, therefore, very slim.

[13] Looking at this matter in totality therefore, the reckless and lackadaisical attitude by the applicant, coupled with the slim prospects of success or the lack of a bona fide defence, bring me to the conclusion that the Applicant has not satisfied the requirements of rescission neither

under the High Court Rules nor the requirements under the common law for rescission.

[E] CONCLUSION AND ORDER

[14] Having concluded that the Applicant was reckless and did not seem to care if judgment is given against him, that he does not have a bona fide defence and prospects of success, the following order is made.

a. The rule is discharged.

b. The Application for rescission is dismissed with costs.

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Kopo M.S.
Judge of the High Court

For Applicant: **ADV. FIHLO**

For 1st Respondent: **ADV. MOHALE**